Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)	
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ClickQuick II, LLC, San Marino at Laguna Lakes, L.L.C. a/k/a Bear Lakes Associates, Ltd., and Villa Del Sol, L.L.C. a/k/a VDS Associates, Ltd. against BellSouth Telecommunications, Inc. First Amended Petition for Declaratory Ruling that the Location of the Demarcation Point Pursuant to 47 C.F.R. §68.105(d) (2) Preempts the Location of the Demarcation Point Pursuant to §25-4.0345(1)(B)(2) of the Florida Administrative Code	)	WC Docket No. 03-112

BELLSOUTH'S COMMENTS

BELLSOUTH TELECOMMUNICATIONS, INC.

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BellSouth Telecommunications, Inc., by counsel and pursuant to the *Public Notice* released in this docket on May 5, 2003, comments on the First Amended Petition for Declaratory Ruling.[1]

I. INTRODUCTION AND SUMMARY

The Commission has already considered the issue of whether its multiunit premises demarcation rule now codified at 47 C.F.R. § 68.105(d)(2) preempts the specific Florida rule invoked by petitioners. In 1997, the Commission expressly rejected assertions that the Florida rule is preempted by the federal rule.

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[1] *Pleading Cycle Established for Comments on Petition for Declaratory Ruling That the Location of the Demarcation Point Pursuant to 47 C.F.R. § 68.105(d)(2) Preempts the Location of the Demarcation Point Pursuant to § 25-4.0345(1)(B)(2) of the Florida Administrative Code,* WC Docket No. 03-112, *Public Notice*, DA 03-1511 (rel. May 5, 2003) ("*Public Notice*").

The instant petitioners have failed to bear their burden of demonstrating circumstances warranting any change in the Commission's 1997 order holding that the Florida rule is not preempted, despite the Commission's contemporaneous observation that, to the extent that local policies would negate federal policies, the Commission would again review the need to preempt state rules. Further, in 2001, the Florida Public Service Commission ("Florida PSC") reminded the Commission of the Florida rule and the local policies underlying it. In light of these events, any party seeking preemption of the Florida rule by 47 C.F.R. § 68.105(d)(2) must, by necessity, provide the Commission with evidence of specific local policies that negate federal policies. Petitioners have provided no evidence that the local policies underlying the Florida rule in 1997, or in 2001, have changed, or that the same federal policies that the Commission determined were not "negated" by the Florida rule in 1997 are negated today.

The "facts" contained in the petition, incomplete and inaccurate, do not suggest that there is any tension between the relevant rules today that did not exist in 1997. Petitioner ClickQuick II is an Internet service provider ("ISP")[2] that admits its motivation: it claims to have "no other economical way" of providing information services in the relatively new multi-tenant environments ("MTEs") at issue without unilaterally appropriating the network facilities of BellSouth, the local exchange carrier ("LEC") serving the tenants of petitioners San Marino and Villa Del Sol. In response to BellSouth's efforts to abate this unauthorized use, the ISP, asserting it is the authorized agent of the petitioner property owners, has sought to simply "deem" the serving LEC's existing network demarcation point to be at a location other than that

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[2] None of the petitioners are telecommunications service providers.

established in fact and under existing law and that it believes will enable it to use BellSouth's network facilities without interference. Importantly, the petitioners do not request or appear to contemplate a physical relocation of the existing demarcation point; indeed they have not invoked the federal relocation rule (47 C.F.R. § 68.105(d)(3)) in either their original or amended FCC petitions or in any correspondence with BellSouth.

The ISP petitioner has in fact been using BellSouth's intra-building network terminating wire ("NTW") without BellSouth's permission since late 2002, interfering with the local telephone service provided by BellSouth to the tenants of petitioners San Marino and Villa Del Sol. Petitioner ClickQuick II has punched jumper wire from its own facilities to BellSouth equipment blocks and routed its own services over BellSouth's NTW, thereby impairing BellSouth's ability to use its own wire to provide local telephone exchange service to its customers. The ISP petitioner has been engaged in a continuous pattern of interfering with BellSouth's property rights under Florida law, and in the process is impairing BellSouth's ability to provide service to its customers, which implicates the policies underlying the Florida PSC's premises demarcation rule. Petitioners' pretextual petition represents a misguided effort to obtain free use of network equipment owned by BellSouth so that the ISP petitioner may engage in the marketing and sale of for-profit information services at the sole risk and expense of BellSouth's shareholders.

II. THE FCC HAS DETERMINED THAT THE FLORIDA RULE IS NOT PREEMPTED.

BellSouth, styled by the petitioners as "Respondent" in the instant petition, specifically asked this Commission nearly thirteen years ago to consider the preemptive effect of the federal

rule now codified at 47 C.F.R. § 68.105(d)(2) on the Florida rule about which the petitioners complain. The Florida rule at issue then was *verbatim* the Florida rule allegedly "at issue" now, and the rule codified at 47 C.F.R. § 68.105(d)(2) is substantially the same. Five years ago, in direct response to BellSouth's request, this Commission determined that there was no reason to preempt the Florida rule.

Specifically, on August 13, 1990, BellSouth filed a timely Petition for Reconsideration with the Commission in which it argued that "the Commission's revised demarcation rule for new multiunit installations unnecessarily preempts conflicting state requirements without serving a valid federal policy negated by such state regulation."[3] The Commission had just adopted the MTE demarcation rule that is in all substantive aspects identical to the rule invoked by petitioners at 47 C.F.R. § 68.105(d)(2), though it has been modified in some aspects and was moved to a different section of Part 68 ten years later.[4]

Moreover, BellSouth advised the Commission that Florida's specific requirements appeared to conflict with the Commission's demarcation rule for new multiunit installations and that these state requirements were "designed to achieve the same regulatory goals which served

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[3] *In the Matter of Section 68.104 and 68.313 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57, Petition for Partial Reconsideration and Clarification of BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company at 10-13 (filed Aug. 13, 1990) ("BellSouth PFR"). BellSouth advised the FCC in the BellSouth PFR that while the former definition of the demarcation point was sufficiently flexible to allow state regulators to require carriers to locate the demarcation point on or within the individual customer's premises in multiunit building installations, the Commission's revised rule conflicted with several state-imposed demarcation point requirements. *Id.* at 10-11.

[4] The federal rule was moved from 47 C.F.R. § 68.3(b)(2), where it was codified originally, to 47 C.F.R. § 68.105(d)(2). *In the Matter of 2000 Biennial Review of Part 68 of the Commission's Rules and Regulations,* CC Docket No. 99-216, *Report and Order*, 15 FCC Rcd 24944 (2000).

as a basis for the Commission's earlier decision . . . to ensure customers have direct access to carrier services rather than being limited to indirect access by building owners who are not subject to regulatory scrutiny or otherwise under a legal duty to respond to a tenant's request for service."[5] BellSouth argued that, if the Commission's overriding concern was to protect the rights of the carrier's customer as opposed to the needs of the building owner and that if the state requirements are designed to address that concern, it would be inappropriate for the Commission to fashion a rule that inadvertently preempts state requirements designed to further that goal.[6] Similarly, another local exchange carrier filed a petition requesting clarification that "[t]he right of a multiunit premises owner to determine the location of the demarcation point or points is subject to provisions of state law or requirements of state regulators."[7] The NYNEX PFR requested clarification that "the rights of customers under state law and regulations supersede a multiunit premises owner's ability to determine the location of the demarcation point under § 68.3(b)(2)."[8]

In its Reply Comments on the various petitions for reconsideration and clarification filed in the wake of the *Simple Inside Wiring Order*,[9] BellSouth demonstrated that the record revealed

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5 BellSouth PFR at 12. BellSouth attached the text of the Florida rule as Exhibit 1 to its PFR, and so the text of rule which petitioners seek to preempt was in the record and before the Commission when it decided not to preempt Florida.

6 BellSouth PFR at 12-13.

7 *In the Matter of Section 68.104 and 68.313 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57 Petition for Clarification and Reconsideration of New York Telephone Company and New England Telephone and Telegraph Company at 5-6 (filed Aug. 13, 1990) ("NYNEX PFR").

8 *Id.* at 6.

9 *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for*

"no opposition to, and substantial support for, BellSouth's request that the Commission reverse its decision to transfer responsibility of the demarcation point in new multiunit installations from the regulated carrier to a building owner/landlord," and BellSouth reiterated that the Florida PSC had adopted a rule (as opposed to a tariff) that was apparently in conflict with the Commission's revised rule, and requested that the Commission eliminate the conflict by granting the various petitions.[10]

In 1997, the Commission specifically considered the preemption issues raised in the BellSouth and NYNEX PFRs, with the text of the Florida rule in the record before it:

> Two Petitioners express concern that the Commission's revised demarcation point rule would conflict with existing state requirements that the demarcation point be located on the customer's premises. In particular, Petitioners are concerned that such state requirements might be inconsistent with the Commission's demarcation point rule for new multiunit premises, which allows the carrier to set the demarcation point at the minimum point of entry, or, if the carrier does not establish such a policy, allows premises owners to place the demarcation point virtually anywhere they choose.
>
> The record at this point reveals no specific local policies that must be preempted. To the extent that local inside wiring policies would negate federal policies, the Commission will review the need to preempt them at that time.[11]

Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association, CC Docket No. 88-57 and RM-5643, *Report and Order and Further Notice of Proposed Rulemaking*, 5 FCC Rcd 4686 (1990) ("*Simple Inside Wiring Order*").

[10] *In the Matter of Section 68.104 and 68.313 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57 Reply Comments of BellSouth on Petitions for Reconsideration and/or Clarification at 2, 5-6, n.11 (filed Nov. 21, 1990).

[11] *In the Matter of Section 68.104 and 68.313 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association*, CC Docket No. 88-57 and RM-5643, *Order on Reconsideration, Second Report and Order and*

Over three years later, on January 22, 2001, the Florida PSC filed comments on this point in the Commission's *Competitive Networks* proceeding. The Florida PSC stated:

> We need to make sure that we are able to pinpoint responsibility when there is a problem. We need to understand how this would affect our rules on the demarcation point and whether there is preemption. *The FPSC assumes that the FCC has not preempted states' demarcation rules; therefore, Florida will maintain its current rules requiring the demarcation point at each customer's premises in multi-tenant dwellings.*[12]

Thus, from a "preemption perspective," the Commission has been specifically aware of the Florida rule since 1990. It expressly declined to preempt the Florida rule five years ago, finding that there were no specific local policies that negated federal policies and, as a result, there was no preemption. As recently as two years ago, the Florida PSC again directed the Commission's attention to (1) the Florida rule, (2) its understanding that the rule had not been preempted, and (3) its intention to maintain that rule. In this context, the Florida PSC also filed with the Commission detailed comments elucidating the policies underlying the state's demarcation rules in MTEs as well as a voluminous record of its own efforts to assure competitive access to MTEs, including hearing transcripts, orders, and research from other jurisdictions. A comprehensive record compiled by the Florida PSC, explaining the policies animating its MTE telephone network demarcation rule and demonstrating that its efforts at MTE competition are consistent with, and in no way negate, current federal policies, was thus

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Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 11897, 11919, ¶¶ 35-36 (1997) ("*Simple Inside Wire Reconsideration Order*").

[12] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Comments of the Florida Public Service Commission in Response to Further Notice of Proposed Rulemaking at 4 (filed Jan. 22, 2001) (emphasis added) ("FPSC *Competitive Networks* Comments").

placed in the record of the *Competitive Networks* proceeding. The Commission has not taken any action since that time that would indicate that it is concerned that Florida's rules and policies conflict with federal policies concerning telephone network demarcations in MTEs or competitive access to MTE. The petitioners have failed to even acknowledge this record in their petition, despite their invocation of the Commission's general preemption authority.

III. PETITIONERS HAVE FAILED TO CARRY THEIR BURDEN OF PROOF.

The Commission has clear authority under the proper circumstances to preempt inconsistent state regulation. Since passage of the 1996 Act, the Commission has developed an analytic framework applicable to preemption petitions brought pursuant to 47 U.S.C. § 253 (which petitioners, who are not telecommunications carriers, have not invoked), and the Commission, of course, has long had the legal authority to preempt inconsistent state requirements whenever it has delegated authority to do so pursuant to the Supremacy Clause.

Of the possible legal grounds to plead for preemption, petitioners have simply chosen the same apparent tension between the two rules that BellSouth raised in 1990; namely, that under the federal rules, and in the absence of a carrier establishing its own practice of placing the demarcation point at the minimum point of entry, the MTE owner has the right to determine the location of the demarcation point, while, under the Florida rule, "[u]nless otherwise ordered by the [Florida] Commission for good cause shown, the location of this [network demarcation] point is . . . [w]ithin the customer's premises at a point easily accessed by the customer."[13]

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[13] Fla. Admin. Code Ann. § 25-4.0345(1)(B)(2) (2003) (referred to throughout these Comments as "the Florida rule"). This rule applies to "Single Line/Multi Customer Buildings." The MTEs are "Single Line/Multi Customer Buildings" under the rule, requiring a demarcation

When the Commission determined that the Florida rule was not preempted, it specifically considered that the federal rule "allows premises owners to place the demarcation point virtually anywhere they choose."[14] Thus, the very federal policy that is implicit in petitioner's request, a policy favoring premises owners' ability to place the demarcation point virtually anywhere they choose, was determined by the Commission ***not*** to be negated by the Florida rule, despite much more extensive arguments made in the record before it then with respect to federal/state policy negation. However, the Commission left open the possibility that changed circumstances could compel a different result, stating that to the extent that local [state] inside wiring policies would negate federal policies, the Commission would review the need to preempt them at that time.[15]

The instant petition, however, fails to describe any "specific local policies that must be preempted,"[16] (that is, any Florida policy) as well as any analysis demonstrating that Florida's policies negate this Commission's policies. Indeed, in their first, procedurally defective petition, filed on February 5, 2003, the petitioners did not even address the Commission's 1997 consideration of the Florida rule, or the Florida PSC's subsequent contribution to the record of

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point at the customer's premises at a point easily accessed by the customer. Petitioners mistakenly continue to question whether the portion of the Florida rule that applies to multi-line systems should apply here, since BellSouth installed four pairs of wire to each unit within the MTEs. The rule contemplates the type of service being provided by the telephone company (i.e., "single line" service versus "multi-line systems" service). At the two MTEs in question, BellSouth is providing single line service, namely, one or more individual telephone lines terminating at each tenant's private residence within the MTE. Each NTW pair provides a "single line" service. The fact that there are four pairs of wires to each unit allowing for each tenant to order up to four single line services from BellSouth does not change the character of the "single line" service to "multi-line systems" service. BellSouth is not serving the tenants with a "multi-line systems" service such as, for example, private branch exchange ("PBX") service.

14 *Simple Inside Wire Reconsideration Order*, 12 FCC Rcd at 11919, ¶ 35.

15 *Id.*, ¶ 36.

16 *Id.*

the *Competitive Networks* proceeding. In the "first" amended petition that has been put out for public comment, petitioners acknowledge the Commission's 1997 determination, continue to ignore the FPSC *Competitive Networks* Comments, and simply state, "[t]his Petition presents a concrete and specific case in which the state law is inconsistent with the federal law and is frustrating the federal policy of promoting competition in the telecommunications industry. The time has come for the Commission to review and preempt the state law."[17]

These assertions are wholly inadequate proof of a need to preempt, especially in light of the Commission's prior analysis and earlier decision regarding the same two rules. Moreover, the Florida PSC has provided evidence of its specific policies to this Commission in the context of the continued coexistence of the two rules. According to the Florida PSC, its rule is motivated by a desire that the Florida PSC be "able to pinpoint responsibility when there is a problem" and to "ensure the customer has dial tone within the customer's premises."[18] Because, when the demarcation point is initially set at the MPOE in a multi-tenant dwelling, the LEC "fulfills its obligation once it has introduced service at the MPOE," the Florida PSC made a locally specific determination:

> In the past, we have filed comments expressing concern that the customer may be harmed if the demarcation point is defined as the minimum point of entry (MPOE). For example, Florida requires local exchange companies (LECs) to complete primary telephone service installation in *three working days* to the demarcation point within customers' premises. By changing the demarcation point to the MPOE, LECs would be relieved of any responsibility or burden to ensure the customer has dial tone within the customer's premises. Under the MPOE scenario, the LEC has fulfilled its

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17 Petition at 6.

18 FPSC *Competitive Networks* Comments at 4.

> obligation once it has introduced service at the MPOE. The landlord or other responsible party may take several days or weeks to complete the connection from the MPOE to the customer's premises. While we have authority to require the carriers to meet certain time frames, we do not have authority to mandate time frames for landlords to act. The FPSC believes that this is not in the public's interest.[19]

In these same comments, and as noted above, the Florida PSC clearly informed the Commission:

> We need to make sure that we are able to pinpoint responsibility when there is a problem. We need to understand how this would affect our rules on the demarcation point and whether there is preemption. *The FPSC assumes that the FCC has not preempted states' demarcation rules; therefore, Florida will maintain its current rules requiring the demarcation point at each customer's premises in multi-tenant dwellings.*[20]

For over a decade, and especially since the Commission's 1997 determination and the Florida PSC's 2001 affirmation, both rules have co-existed in Florida. Petitioners' unsupported allegation that the Florida rule "is frustrating the federal policy of promoting competition in the telecommunications industry" is totally groundless. In the first case, none of the petitioners are even telecommunications carriers, and the petition is not brought pursuant to section 253. In the second case, there is no evidence of frustrated competition at the specific locations, or at MTEs in Florida generally, as a result of any conflict between the two rules. Further, the Florida PSC's efforts to keep the Commission apprised of its rule, the policies underlying its rule, and its efforts to promote telecommunications competition in MTEs in the Commission's own

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19 *Id.* at 4-5 (emphasis added).

20 *Id.* at 4 (emphasis added).

Competitive Networks proceeding (considering telecommunications competition in MTEs) are indicative of the Florida PSC's efforts, through its rule, to promote, not frustrate, the federal policy and to serve the key regulatory purpose of protecting consumers.

Nor is the alleged "concrete and specific case" alleged in the petition legally sufficient from a burden of proof standpoint. The petition merely alleges, with respect to the Florida rules, that in December of 2002 (a date after BellSouth had completed installation of its facilities to the customers' premises) "BellSouth advised ClickQuick II that BellSouth was taking the position that the demarcation point for telephone wiring at San Marino and Villa Del Sol is at the wall plate inside each dwelling unit."[21] Specifically, the petition alleges:

> BellSouth took this position in reliance on §25-4.0345(1)(B)(2) of the Florida Administrative Code which defines the "Demarcation Point" as "the point of physical interconnection (connecting block, terminal strip, jack, protector, optical network interface, or remote isolation device) between the customer's premises wiring. Unless ordered otherwise by the [Florida Public [Service] Commission], the location of this point [for a Single Line/Multi Customer Building is] within the customer's premises at a point easily accessed by the customer." Based on this position, BellSouth sent Petitioners a "cease and desist" letter, a true copy of which is annexed as Exhibit A.[22]

The petition further states that "BellSouth has violated 47 C.F.R. § 68.105(d)(2) in refusing to permit the multiunit premises owner to determine the location of the demarcation point."[23] This is wrong. BellSouth has not established an MPOE policy, but it is not required to.

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[21] Petition at 4, ¶ 11.

[22] *Id.* (*See* n.13, *supra*, for BellSouth's response to the footnote, questioning BellSouth's interpretation of state law, omitted from the text above).

[23] *Id.* at 5, ¶ 15.

BellSouth complied with the Florida rule, a rule that this Commission expressly declined to preempt. Moreover, the Florida rule is presumptive only; it merely establishes where the demarcation point shall be in four different scenarios "unless otherwise ordered by the Commission." In light of this, the Florida rule permits MTE owners to determine a different location of the demarcation point by order of the Florida PSC if the customer's premises are not acceptable. Petitioners have provided no evidence that they advised the Florida PSC of their desire to locate the telephone network demarcation point at any point other than presumptively established by the Florida rule.[24]

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[24] The Commission has preempted inconsistent State legislation despite the ability of the State Commission to waive the inconsistent requirements. However, because this Commission has already determined that the administrative rule now codified at 47 C.F.R. § 68.105(d)(2) is not inconsistent with and therefore does not preempt the Florida administrative rule at issue here, and for the reasons discussed below, the ability of the petitioners to obtain an order establishing a different demarcation location and the circumstances of this petition are distinguishable from that portion of the *Texas Preemption Order* relating to the FCC's preemption of state network build-out requirements as a condition of reselling incumbent LEC services. *In the Matter of The Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of Preemption Order* resulted from a series of petitions for preemption brought by the state of *1995*, CCB Pol 96-13, *et al.*, *Memorandum Opinion and Order*, 13 FCC Rcd 3460 (1997).

Texas Preemption Order resulted from a series of petition for preemption brought by the state of Texas and various telecommunications carriers under section 253 of the 1996 Act concerning the interplay between the Texas Public Utility Regulatory Act of 1995 and the federal Telecommunications Act of 1996. Although the Commission decided not to preempt many provisions of the Texas Act "based directly on the interpretation of the provision advanced by the Texas Commission," 13 FCC Rcd at 3465, ¶ 10, the Commission preempted specific state legislative requirements that restricted the resale of incumbent LEC services to those competitive LECs who complied with specific build-out requirements, under authority of 47 U.S.C. § 251(c)(4)(B) (prohibiting unreasonable or discriminatory conditions or limitations on resale) because the state build-out requirements effectively precluded CLECs from reselling ILEC services. *Id.* at 3505, ¶ 92. The Texas Commission had granted waivers of these build-out requirements, waivers that were simultaneously challenged by the local incumbent LEC in state court and held out by the incumbent LEC as obviating the need for the FCC to take any preemptive action. The Commission, however, expressed its intent "to make permanent the 'temporary' waivers granted by the Texas Commission," and viewed its preemption action as consistent with the actions of the Texas Commission. *Id.*, ¶ 94.

Moreover, the letter attached to the petition as Exhibit A demonstrates that there are no facts presenting the type of conflict between federal and state rules that requires federal preemption. The letter makes clear that the ISP petitioner has been using BellSouth's NTW

The Florida rule's express provision for Florida PSC-ordered exceptions to the presumptive location of the telephone network demarcation point in MTEs is distinguished from the waiver provisions of the Texas statute that failed to "save" the state-required build-out/resale pre-condition from federal preemption. First, the Commission has already determined that the Florida rule is not preempted, and that no local policies negate any federal policy. Second, the Commission itself pointed out that the Texas build-out requirements are of "central importance to competitive entry because these requirements impact the threshold question of whether a new entrant enters the local exchange market at all by limiting the rights of new entrants to compete in the provision of all services through resale of incumbent LEC services and the purchase of access to unbundled network elements provided by incumbent LECs." *Id.* at 3506, ¶ 95. In contrast, the Commission wrote, "provisions where we do not preempt based on interpretations proffered by the Texas Commission generally involve the manner in which competitive services are provided or involve the provision of discrete services." *Id.* (noting the build-out requirement is "more harmful" because there is a greater impact on competition, and failure to resolve the issue would possibly delay significantly local exchange competition in Texas).

Here, the petitioners do not demonstrate that the Florida administrative rule is of similar "central importance to competitive entry," nor can they, beyond a single unsubstantiated averment, which rings hollow from an unregulated ISP that is essentially stealing a serving LEC's network so as not to incur its own business risk or expense, and two unregulated building owners, whose exact relationship with, and interest, if any, in the ISP is not known. Florida is one of the most competitive local exchange markets in the entire nation, due largely to the regulatory policies of the Commission and the Florida PSC. In any event, as shown above, and contrary to petitioners' assertions, the Florida rule can and does comport with building owner choice. The Florida PSC has made its position on competitive entry in MTEs clear in its voluminous 2001 submission to the FCC's *Competitive Network* proceeding, and petitioners have not even addressed the local policies animating the Florida PSC's rule or its MTE policies in general.

Finally, in *Texas Preemption Order* the Commission was able to find that its decision to preempt the state build-out requirements was not inconsistent with the Texas Commission's determination that it was in the public interest to waive the same requirements. Neither the Texas Commission, nor this Commission, believed the state legislature's 1995 build-out requirement was in the public interest in light of the 1996 Act. The Commission cannot make a similar determination here, because it has already determined that the Florida administrative rule is not preempted by the federal administrative rule, and the Florida PSC has relied on that determination. Indeed, the Florida PSC has steadfastly advised the Commission of its continuing intent to apply the un-preempted rule, the local policies animating that rule, and its continuing efforts with respect to encouraging competition in MTEs. In the absence of a demonstration of any new circumstances or any action taken by the Florida PSC that negates any federal policies embodied in 47 C.F.R. § 68.105(d)(2), federal preemption would itself negate valid local policies and thus be inconsistent with the intent of the Florida PSC.

without BellSouth's permission, interfering with the local telephone service provided by BellSouth to the San Marino and Villa Del Sol petitioners' tenants, who are BellSouth's customers for local exchange service.[25]

As the attached Affidavit of Edward Charles Brower demonstrates, the petitioners' recitation of the facts is misleading. When petitioners recited the "facts" in their first petition, they claimed to be "sharing" BellSouth's NTW.[26] As BellSouth explained in the opposition it filed in response, BellSouth was "sharing" its NTW with petitioner ClickQuick II in the same sense that a farmer "shares" his corn with crows. Petitioners have dropped the "sharing" claim and now allege that the four sets of wire at issue are green, brown, blue and orange, and that petitioner ClickQuick II (apparently) is only using those colors which it knows BellSouth not to be using. The facts cited by ClickQuick II as to which wires it is using are again wrong, as shown in the attached affidavit, and in any event, the use still constitutes the unauthorized use of BellSouth's network facilities, interferes with BellSouth's ability to use the wires and does not implicate any preemption issues.[27]

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[25] Petition, Exhibit A. Litigation is pending between the parties in Florida arising out of petitioner ClickQuick II's past and continuing misappropriation of BellSouth network facilities.

[26] ClickQuick II, LLC, *et al.*, Petitioners, against BellSouth Telecommunications, Inc., Respondent, Petition for Declaratory Ruling That the Location of the Demarcation Point Pursuant to 47 C.F.R. § 68.105(d)(2) Preempts the Location of the Demarcation Point Pursuant to § 25-4.0345(1)(B)(2) of the Florida Administrative Code (filed Feb. 5, 2003) at 2, 3, ¶¶ 4, 7 ("February petition").

[27] Affidavit of Edward Charles Brower ("Brower aff."), ¶¶ 8-12. BellSouth pre-wired both MTEs to the individual customer premises in accordance with the Florida rule to fulfill current and future service orders to tenants. Petitioner Click Quick II has punched jumper wire from its own facilities to BellSouth equipment blocks, then routed its own services over BellSouth's NTW, thereby impairing BellSouth's ability to use its own wire to provide telecommunications service to its customers. *Id.*, ¶ 12. .

Finally, petitioners state that the "sole reason BellSouth offers for refusing to follow 47 C.F.R. § 68.105(d)(2) is the assertion that §25-4.0345(1)(B)(2) of the Florida Administrative Code is not preempted by 47 C.F.R. § 68.105(d)(2)."[28] This in no way establishes petitioners' burden. It was this Commission that determined in 1997, after BellSouth laid the texts of the two rules side by side before the Commission, that there was no reason to preempt the Florida rule. The petitioners could address their issues to the Florida PSC, whose rule authorizes departures from the demarcation location, but have not done so, perhaps because it may be more convenient for the petitioner ISP to ask the Commission to reverse its prior decisions and policies and preempt a state rule it does not like rather than to demonstrate good cause to the Florida PSC for a different demarcation point.

IV. PETITIONERS CANNOT INVOKE § 68.105(d)(2) UNILATERALLY AND RETROACTIVELY.

The Commission's rule 68.105(d)(2), as well as the Florida rule at issue, applies to the initial location of the demarcation point. Although the Commission has a rule that allows premises owners to request and obtain a relocation of an existing demarcation point, petitioners have not invoked that rule in their petition.[29] Nor do petitioners contend that there is any

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[28] Petition at 5, ¶ 16.

[29] In both its February petition, and in its First Amended Petition filed in April, 2003, petitioners specifically request a declaration that the petitioners have "the right to set the demarcation point at 6" on the carrier's side of the 66 block at the properties they own ***pursuant to §68.105(d)(2)***," that petitioner ClickQuick II has "the right to use the facilities on the customer's side of that demarcation point" and that the Florida multi-tenant dwelling demarcation rule, Fla. Admin. Code §25-4.0345(1)(B)(2),"is preempted to the extent it conflicts with ***47 C.F.R. § 68.105(d)(2).***" February petition at 5; petition at 6 (emphasis added). Indeed, the very caption of this proceeding is "ClickQuick II, LLC, San Marino at Laguna Lakes, L.L.C. a/k/a Bear Lakes Associates, Ltd., and Villa Del Sol, L.L.C. a/k/a VDS Associates, Ltd. against BellSouth Telecommunications, Inc. First Amended Petition for Declaratory Ruling that the

inconsistent state regulation or rule that frustrates the federal relocation rule. Rather than invoke the "relocation" rule, the petitioners instead seek the authority to "deem" the existing demarcation point to be at the MPOE and take no notice of the federal relocation rule's negotiation process. Nowhere in their petition, nor anywhere in the correspondence with BellSouth, has any petitioner invoked its rights under (d)(3); rather, they have insisted that under the principles of preemption they have the absolute right to determine the location of the demarcation point retroactively (in other words, ***after*** BellSouth has already established the demarcation point at the customer's premises and, thus, placed the NTW ClickQuick II is using and wishes to continue to use) under (d)(2).[30]

The petition's bald request for a declaration that the petitioners have "the right to set the demarcation point at 6" on the carrier's side of the 66 block at the properties they own pursuant to 47 C.F.R. §68.105(d)(2)," that petitioner ClickQuick II has "the right to use the facilities on the customer's side of that demarcation point" and that the Florida multi-tenant dwelling demarcation rule, Fla. Admin. Code §25-4.0345(1)(B)(2), "is preempted to the extent it conflicts with 47 C.F.R. §68.105(d)(2)"[31] is inconsistent with the procedures established by the Commission for demarcation point relocations and is, in any event, unsupported by facts or law.

Location of the Demarcation Point Pursuant to ***47 C.F.R. §68.105(d)(2)*** Preempts the Location of the Demarcation Point Pursuant to §25-4.0345(1)(B)(2) of the Florida Administrative Code" (emphasis added).

[30] BellSouth has sought to clarify this point with petitioners in correspondence that BellSouth has shared with Commission staff following petitioners' initial lodging of the February petition. BellSouth has to date received no unequivocal relocation request from the building owners, nor any unequivocal indication from the building owners as to which entities are authorized to make such a relocation request.

[31] Petition at 6.

Instead, petitioners seek the retroactive application of a different federal rule (in fact, the rule pertaining to initial installations) to a fact situation that has already occurred under a valid state rule that, in turn, has not been shown by petitioners to negate any valid federal policy.

Further, if petitioners had established an MPOE demarcation point prior to initial installation by BellSouth (whether through securing an exception to the Florida PSC rule or otherwise), BellSouth would have terminated its network at the MPOE and would not have installed the intra-building NTW that ClickQuick II is using and wishes to continue to use and without which petitioners allege that "there is no economical way for ClickQuick II to provide its service" at Villa Del Sol and San Marino.[32] Perhaps this explains why petitioners seek a ruling concerning 47 C.F.R. § 68.105(d)(2), and never have invoked 47 C.F.R. § 68.105(d)(3) – to do so would acknowledge the demarcation point was lawfully established in the first instance and would compel petitioners, under federal rules, to negotiate in good faith with BellSouth over the terms and conditions of the relocation, including appropriate compensation under the federal rules for BellSouth's investment. At a minimum, it shows why retroactive application of 47 C.F.R. § 68.105(d)(2) would benefit ClickQuick II at the expense of BellSouth.

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[32] *Id.* at 2, 3, ¶¶ 4, 8. Ironically, it was for this reason that the Commission declined to adopt a mandatory MPOE demarcation rule for MTEs a little over two years ago – "Relocation of the demarcation point to the MPOE, however, would result in a decrease in the amount of wiring within the building that is available to competitive LECs as part of the loop, which by definition ends at the demarcation point." *In the Matter of Competitive Networks in Local Telecommunications Markets, et al.,* WT Docket No. 99-217, *et al., First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 FCC Rcd 22983, 23006-07, ¶ 51 (2000) (*"Competitive Networks Order"*). Of course, Petitioner ClickQuick II is not a competitive LEC and is therefore not entitled to purchase unbundled subloops from incumbent LECs (although nothing precludes ISPs from partnering with other LECs, becoming certified as a LEC, or making separate arrangements with building owners for the installation of their own intra-building network facilities).

Petitioner building owners (and petitioner ClickQuick II) always had and continue to have the option of installing their own network wire.[33] Indeed, with the cooperation of the petitioner building owners, BellSouth installed its network wire within conduit installed for that very purpose by each petitioner building owner.[34] This installation took place as recently as the third quarter of 2002 with respect to the properties.[35] In any event, and as quoted by the petitioners, the Florida rule states that the serving carrier's network will terminate at a premises demarcation "[u]nless ordered otherwise by the [Florida PSC]."[36] Building owner petitioners were free to contact the Florida PSC and obtain an exception to the presumptive premises demarcation point, for good cause shown.

There are no state regulatory policies that negate any federal policies under these facts. Petitioner ClickQuick II, which is neither a building owner nor a telecommunications service provider, is using BellSouth's network equipment and facilities without its permission, and causing trouble for BellSouth and its customers alike. As the Florida PSC has stated, "the wire from the MPOE to the customer's premise is considered network wire in Florida."[37] Thus, ownership of network wire is determined under Florida law. Petitioner ClickQuick II is interfering with BellSouth's property rights under Florida law. In the process, ClickQuick II is

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33 "Landlords, CLECs, or LECs are not precluded from owning the wire installed between the MPOE and the demarcation point within the customer's premises. The local service provider and the owner of the wire between the MPOE and the demarcation point can be required to reach an agreement on the use of the wire." FPSC *Competitive Networks* Comments at 5.

34 Brower aff., ¶ 4.

35 *Id.*

36 Petition at 4, ¶ 11.

37 FPSC *Competitive Networks* Comments at 5.

impairing BellSouth's ability to provide service to its customers, which implicates the policies underlying Florida PSC's premises demarcation rule in multi-tenant dwellings.[38] This petition is simply a ruse designed to legitimize this conduct.

V. ANY PREEMPTIVE ACTION TAKEN BY THE COMMISSION MUST BE PROSPECTIVE ONLY.

Petitioners have not carried their burden of proving that the Florida rule should be preempted. If, however, the Commission does decide to preempt the Florida rule, it must clarify that the rule is preempted on a going-forward basis only, and that premises owners in Florida that seek a relocation of their existing demarcation points must comply with all applicable rules for demarcation relocation.

VI. CONCLUSION

The underlying, but unspoken, assumption of the petitioners is that if Florida did not have a presumptive premises demarcation rule for MTEs, the petitioners would have established the initial demarcation point at the MPOE and, thus, the ISP petitioner would be free to use what Florida considers "network" wire without interference from the serving local exchange carrier. This is speculative and logically inconsistent. Florida has a presumptive premises demarcation rule that has withstood over a decade of direct Commission scrutiny and co-exists with the Commission rule. There is no factual indication that the petitioner building owners would have chosen differently in the absence of the current Florida rule. Ironically, as discussed above, if BellSouth had initially terminated its network at the MPOE at the direction of petitioners, there would not now be any BellSouth network wire on the "customer" side of the MPOE for the

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[38] Brower aff., ¶¶ 8-14; FPSC *Competitive Networks* Comments at 4-5.

petitioner ClickQuick II to use. In that case, the building owner petitioners would have to have arranged for the installation of network wire between the MPOE and the customer premises, and the property owner petitioners would be free to make whatever arrangements they felt were necessary with the ISP petitioner to use that wire.

Petitioners' motive is transparent: they seek this "relief" in order to obtain the use of state of the art network equipment owned and recently installed by BellSouth without compensation to BellSouth in order to market and provide information services for profit. The existence of conduit installed by the petitioner building owners demonstrates that all petitioner building owners were well aware of BellSouth's plans to install the intra-building network wire to establish the demarcation point at the customer's premises and that all petitioners were free to install their own intrabuilding network wire in that same conduit in order to provide information services to building residents a matter of months ago, and they remain free to do so now. The rules in effect in Florida, and the policies surrounding those rules, allow competitive access to MTEs. Nothing about these policies or rules conflict with any federal policy, and petitioners have failed to carry their burden of proof on this point. Moreover, petitioners did not avail themselves of the opportunity to seek a different demarcation point at the time of initial installation under Florida law, have not availed themselves of relocation procedures under applicable law, and have behaved unlawfully with respect to BellSouth's property. These actions doubly counsel against the regulatory alchemy sought by the petition by requesting preemptive and retroactive application of 47 C.F.R. § 68.105(d)(2) in Florida: to turn green,

brown, blue and orange-sheathed copper into gold by accessing BellSouth's property without authority or compensation under color of federal law.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: /s/ Theodore R. Kingsley
Theodore R. Kingsley
Richard M. Sbaratta

Its Attorneys

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0720

Date: June 4, 2003

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

ClickQuick II, LLC,	)
San Marino at Laguna Lakes, L.L.C.	)
a/ka/ Bear Lakes , Ltd., and	)
Villa Del Sol, L.L.C. a/ka VDS Associates, Ltd.	)
Petition for Declaratory Ruling that the Location	)
of the Demarcation Point Pursuant to 47 C.F.R § 68.105(d)(2)	)
Preempts the Location of the Demarcation Point Pursuant to	)
§ 25-4.0345(1)(B)(2) of the Florida Administrative Code	)
	)

AFFIDAVIT OF EDWARD CHARLES BROWER

The undersigned, being of lawful age and duly sworn, does hereby state as follows:

1. My name is Edward Charles Brower. My business address is 6451 N. Federal Highway, Suite 443, Ft. Lauderdale, Florida 33308. My title is Area Manager - Network, BellSouth Telecommunications, Inc. I have served in my present position for 10 years. In my position, I am responsible for overseeing the design of BellSouth cable distribution systems for commercial properties and multi-dwelling unit residential properties. I have been with BellSouth since 1978. Prior to my current position, I held various construction and engineering related positions with BellSouth. In 1977, I graduated from the College of William & Mary with a Bachelor's degree in political science. In 1987, I graduated with an MBA from Nova Southeastern University.

2. This affidavit responds to factual assertions by ClickQuick II, LLC (Click), San Marino at Laguna Lakes, LLC a/k/a Bear Lakes Associates, Ltd. (Bear Lakes) and Villa Del Sol a/k/a VDS Associates, Ltd. (VDS) (collectively, the Petitioner) in their First Amended Petition for Declaratory Ruling that the Location of the Demarcation Point Pursuant to 47 CFR 68.105(d)(2) Preempts the Location of the Demarcation Point Pursuant to 25-4.0345(1)(B)(2) of the Florida Administrative Code (Petition).

3. In my position, I supervised the design of the cable distribution system for the Villa Del Sol property in Boynton Beach, Florida and the San Marino property in West Palm Beach, Florida and have personal knowledge regarding BellSouth's installation and use of the twisted pair wiring (network terminating wire or NTW) and "66 blocks" at Villa

Del Sol and San Marino and regarding how Click has made unauthorized use of BellSouth's NTW.

4. During or around 2nd quarter 2002, BellSouth installed its own NTW at Villa Del Sol. BellSouth ran this NTW through conduit which the property owner installed at Villa Del Sol at BellSouth's request. During or around 3rd quarter, 2002, BellSouth installed its own NTW at San Marino. BellSouth ran this NTW through conduit which the property owner installed at San Marino at BellSouth's request.

5. A "66 block" is a device on which wires, such as NTW, are terminated. BellSouth installed 66 blocks in the telecommunications closet (or what Petitioners refer to in their petition as the "utility room") in each residential building at Villa Del Sol and San Marino. BellSouth installed the 66 blocks on or about the dates in Paragraph 4 above. Villa Del Sol contains 13 residential buildings. San Marino contains 17 residential buildings A telecommunications closet is located on the ground floor of each residential building. BellSouth installed four (4) pairs of NTW from the 66 blocks to each dwelling unit in Villa Del Sol. BellSouth installed four (4) pairs of NTW from the 66 blocks to each dwelling unit in San Marino.

6. BellSouth installed its own NTW to each dwelling unit and established the demarcation point in each dwelling unit to comply with Florida Public Service Commission (FPSC) rules. FPSC Rule 25-4.0345 requires that, in single line/multi-customer buildings like those at Villa Del Sol and San Marino, the demarcation point be installed within the customer's premises at a point easily accessed by the customer. The FPSC Rule defines the demarcation point as the point of physical interconnection between the telephone network and the customer's premises wiring.

7. Because each NTW pair accommodates one telephone line, BellSouth installed four NTW pairs to each dwelling unit so that BellSouth can meet a customer's service request if a customer orders more than one, and up to four, lines from BellSouth in a unit.

8. As stated in Paragraphs 4 and 7 of the Amended Petition, at Villa Del Sol and San Marino, Click has, in fact, used two (2) pairs of BellSouth's NTW to each dwelling unit to deliver Click's service to the unit. Click did not first obtain BellSouth's permission for, or even provide advance notice to BellSouth of, the use. Click is using the two pairs of BellSouth NTW to the exclusion of BellSouth, thereby impairing BellSouth's ability to provide service to residents of the individual dwelling units.

9. Paragraph 3 of the Amended Petition states that the four (4) pairs of NTW running to each dwelling unit are colored blue, green, orange and brown. The four pairs are these colors but, in order, the colors for pairs 1, 2, 3 and 4 are blue, orange, green and brown, respectively.

10. Contrary to the allegations at Paragraph 8 of the Amended Petition, at six (6) buildings in Villa Del Sol, Click is using the green and brown NTW pairs, and at seven (7) buildings in Villa Del Sol, Click is using the orange and brown NTW pairs.

11. Contrary to the allegations at Paragraph 4 of the Amended Petition, at eleven (11) buildings in San Marino, Click is using the green and brown NTW pairs, and at six (6) buildings in San Marino, Click is using the orange and brown NTW pairs.

12. Paragraphs 4, 5 and 8 of the Amended Petition assert that Click is using NTW pairs not used by BellSouth to provide its services. Although BellSouth may not have been using the NTW pairs when Click's use commenced, as stated in paragraph 8 above, Click is using two pairs of BellSouth NTW to the exclusion of BellSouth. Click's use of two pairs will interfere with BellSouth's use of the pairs when BellSouth receives customer orders for additional service that will require BellSouth's use of the pairs. Further, use of the two pairs, regardless of whether BellSouth was using them at the time Click's use commenced, is still unauthorized use and misappropriation of BellSouth's NTW by Click.

13. The three photographs attached as Exhibit A depict how Click has appropriated BellSouth's NTW for its use at telecommunications closets at Villa Del Sol. The set-up shown in the photographs is typical of Click's set-up in the other telecommunications closets at Villa Del Sol and in telecommunications closets at San Marino.

14. The blue structures in the photographs are BellSouth's 66 blocks. The gray wires running down from the 66 blocks are BellSouth's NTW. The yellow wires in the photographs are Click's wires. As depicted in the first two photographs, Click has run its yellow wires from its equipment (the silver box on the right in each photograph) to BellSouth's 66 blocks and has terminated (or "punched down") its jumpers down on BellSouth's 66 blocks, thus providing Click connectivity to BellSouth's NTW. Click has made these unauthorized attachments in each telecommunication closet at Villa Del Sol and San Marino with the result that, as of the date of this Affidavit, Click has attached to 50% of BellSouth's NTW (in other words, two (2) of four (4) NTW pairs running to each dwelling unit) at Villa Del Sol and San Marino. The third photograph attached depicts a close-up of Click's termination of its yellow wires on BellSouth's 66 block.

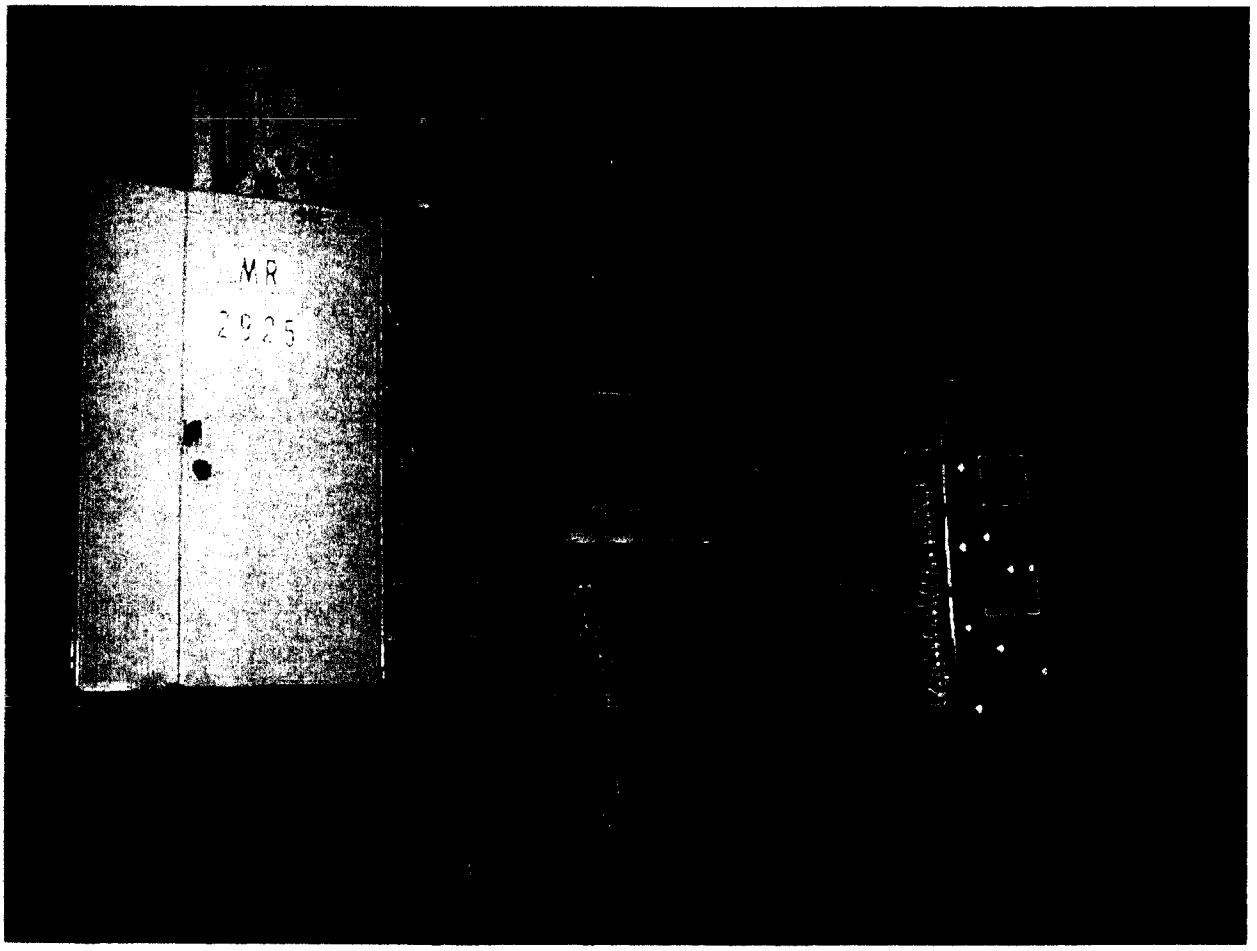
Edward Charles Brower
EDWARD CHARLES BROWER

Sworn to and subscribed before me,
a Notary Public, this 3
day of June, 2003
Anita L Ferrese
Notary Public

ANITA L. FERRESE
Notary Public - State of Florida
My Commission Expires Oct 3, 2005
Commission # DD043608

EXHIBIT A

See Photographs Attached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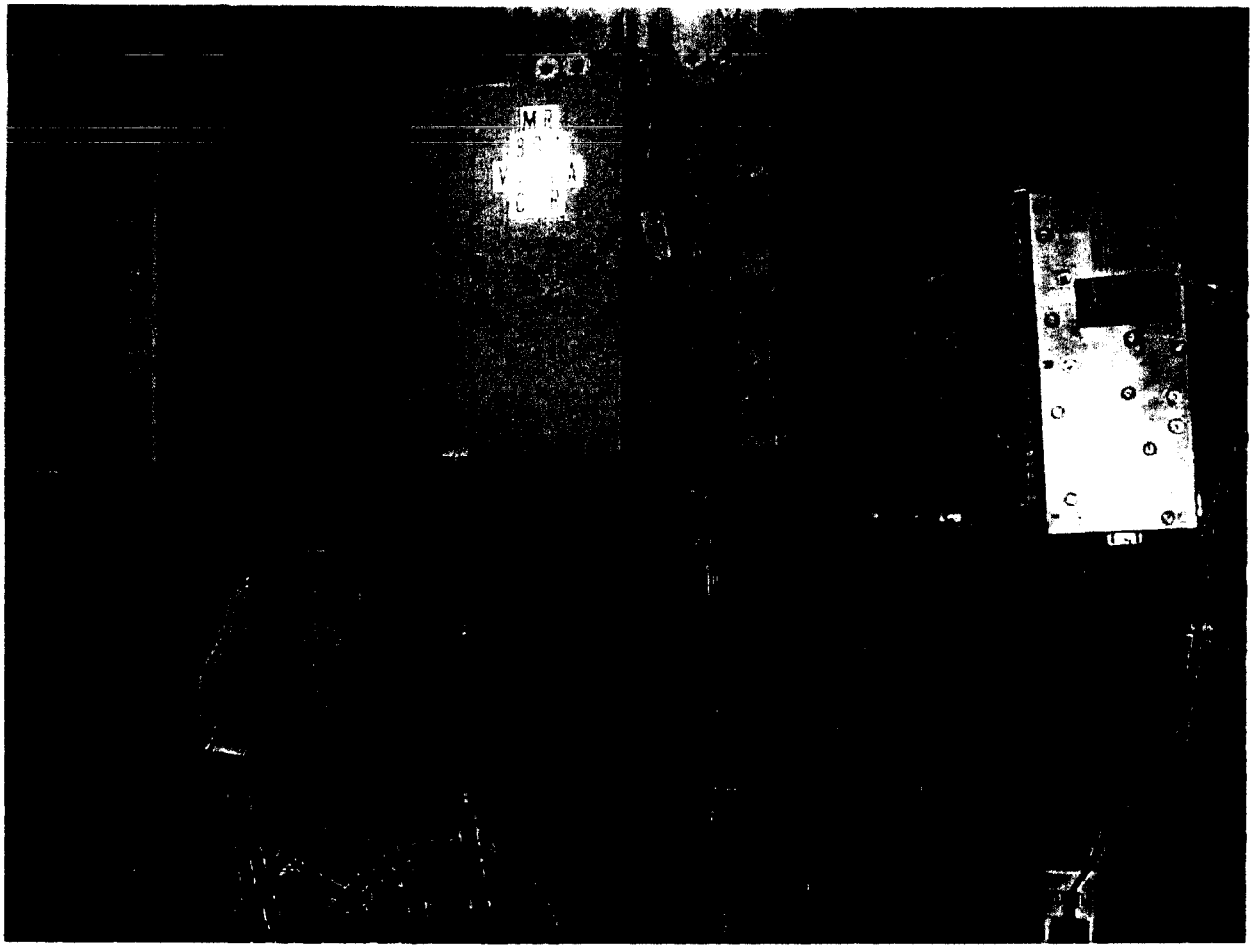

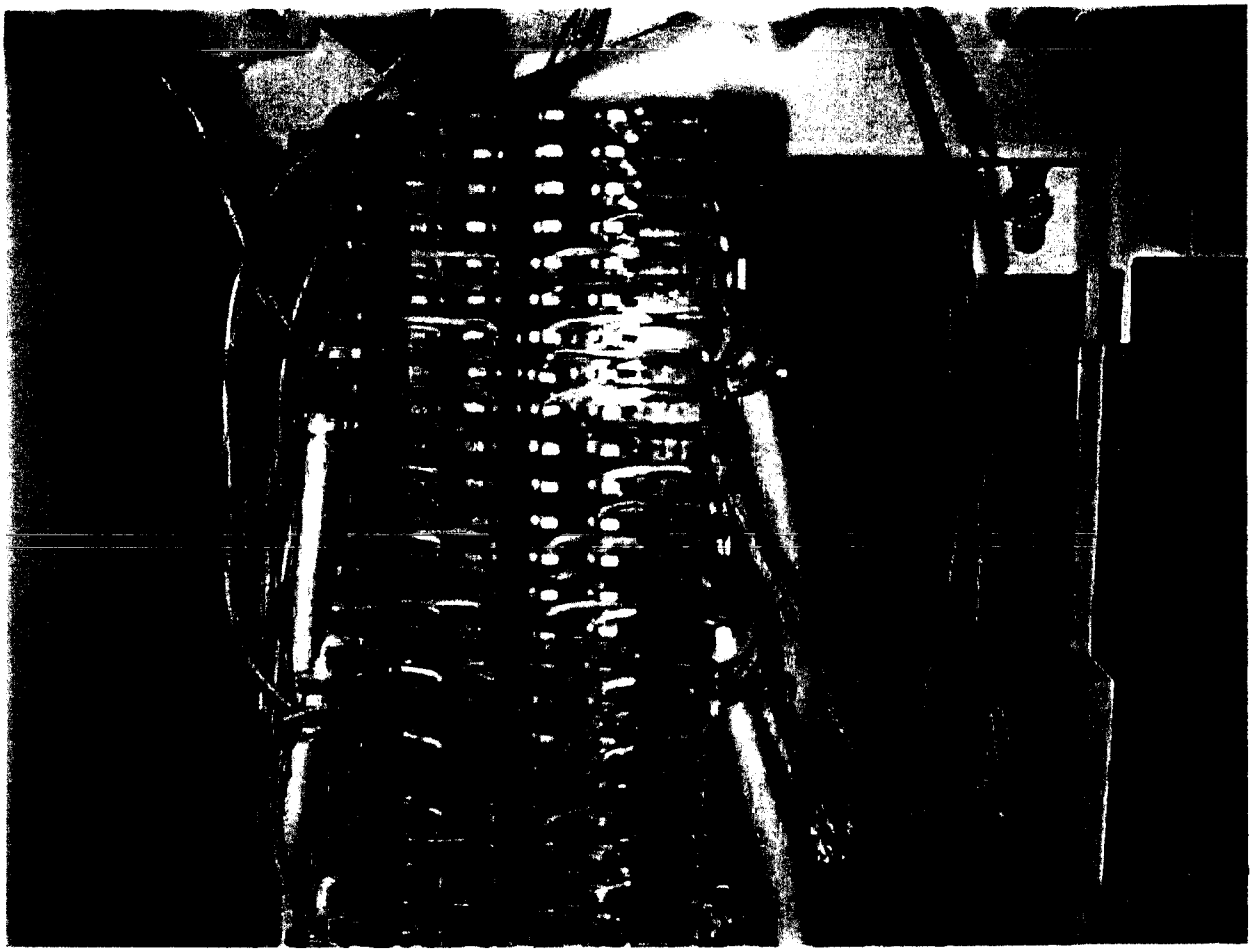

CERTIFICATE OF SERVICE

I do hereby certify that I have this 4th day of June 2003 served the following parties to this action with a copy of the foregoing **BELLSOUTH'S COMMENTS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee
Juanita H. Lee

Service List WC Docket No. 03-112

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+ VIA ELECTRONIC FILING